Supreme Court, U.S.
FILED
APR - 6 1994
OFFICE OF THE CLERK

No. 93-1281

In The

Supreme Court of the United States

October Term, 1993

AUBURN POLICE UNION, ET AL.,

Petitioners,

v.

MICHAEL E. CARPENTER,
ATTORNEY GENERAL OF THE STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MICHAEL E. CARPENTER
Attorney General

STEPHEN L. WESSLER
Assistant Attorney General
Department of Attorney General
State House Station 6
Augusta, Maine 04333
(207) 626-8800
Counsel of Record

THOMAS D. WARREN
Assistant Attorney General
Of Counsel

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Does a Maine statute which prohibits solicitations of property from the general public if the property will tangibly benefit a law enforcement officer, law enforcement agency or law enforcement association violate the First and Fourteenth Amendments to the United States Constitution?

LIST OF PARTIES

In addition to the Auburn Police Union, the Petitioner named in the caption, the Portland Police Benevolent Association, the Lewiston Police Union, Leonard Dexter, Kevin MacDonald, David B. Chamberlain, R.H. McKnight Company, Inc., and Charles Underwood are petitioners in this case. Michael Carpenter, Attorney General of the State of Maine, is the only respondent.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

First Amendment to the United States Constitution 2

Fourteenth Amendment to the United States Constitution, Sec. 1 2

25 Me. Rev. Stat. Ann. §3702-A (1993) 3

STATEMENT OF THE CASE 3

REASONS FOR DENYING THE WRIT 3

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS 5

II. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS BELOW CORRECTLY APPLIED PRECEDENT FROM THIS COURT .. 8

A. Overbreadth 9

B. Underinclusiveness 11

TABLE OF CONTENTS – Continued

Page

C. As Applied Challenge 13

D. Prior Restraint 13

III. THE FIRST CIRCUIT'S DECISION DOES NOT HAVE BROAD NATIONAL EFFECT: MAINE IS THE ONLY STATE WHICH HAS ADOPTED A STATUTE PROHIBITING SOLICITATIONS BY OR ON BEHALF OF POLICE OFFICERS 15

CONCLUSION 16

TABLE OF AUTHORITIES

Page

CASES:

Auburn Police Union v. Carpenter, 8 F.3d 886 (1st Cir. 1993) ..... *passim*

Auburn Police Union v. Carpenter, 798 F.Supp. 819 (D. Me. 1992) 2, 5, 10, 11

Auburn Police Union v. Tierney, 756 F.Supp. 610 (D. Me. 1991) 4, 6, 7

Austin v. Michigan State Chamber of Commerce, 494 U.S. 652 (1990) 12

Hicks v. Miranda, 422 U.S. 332 (1975) 9

Mandel v. Bradley, 432 U.S. 173 (1977) 9

New York v. Ferber, 458 U.S. 747 (1982) 9, 15

New York v. O'Neill, 359 U.S. 1 (1959) 15

Pittsburg Press Co. v. Pittsburg Comm'n on Human Relations, 413 U.S. 376 (1973) 14

Police Dept. of Chicago v. Mosley, 408 U.S. 92 (1972) 12

State of Maine v. Maine State Troopers Ass'n. ("MSTA"), 491 A.2d 538 (Me. 1985), appeal dismissed 474 U.S. 802 (1985).....3, 8, 9, 11

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947 (1984)..... 10

Telco Communications v. Barry, 731 F.Supp. 670 (D. N. J. 1990) 6, 8

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTIONAL PROVISIONS AND STATUTES

First Amendment to the Constitution 2

Fourteenth Amendment to the United States Constitution, Sec. 1 2

25 Me. Rev. Stat. Ann. §3701 *et seq.* 3

25 Me. Rev. Stat. Ann. §3702 ..... 3, 9

25 Me. Rev. Stat. Ann. §3702-A (1992) 3, 9

28 U.S.C. §1254(1) 2

Me. P. L. 1991 Chapter 510 4

Sen. Amend.B. to L.D. 1682 (115th Maine Legis. 1991) 5

MISCELLANEOUS

United States Supreme Court Rule 10-1(a) 6

1 B Moore's Federal Practice (1993) 7

Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* (7th ed. 1993) 6

No. 93-1281

In The

Supreme Court of the United States

October Term, 1993

AUBURN POLICE UNION, ET AL.,

Petitioners,

v.

MICHAEL E. CARPENTER,
ATTORNEY GENERAL OF THE STATE OF MAINE,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Michael E. Carpenter, Attorney General of the State of Maine, Respondent, respectfully files this brief opposing the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS BELOW

The opinion of the First Circuit Court of Appeals (Appendix to Petition at 1a-43a) [hereinafter referred to

as App. ___] is reported at 8 F.3d 886. The opinion of the District Court for the District of Maine (App. 44a-62a) is reported at 798 F.Supp. 819.

JURISDICTION

The judgment of the First Circuit Court of Appeals was entered November 12, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

First Amendment to the United States Constitution.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Fourteenth Amendment to the United States Constitution, Sec. 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

25 Me. Rev. Stat. Ann. §3702-A (1993).

A person may not solicit property from the general public when the property or any part of the property in any way tangibly benefits, is intended to tangibly benefit or is represented to be for the tangible benefit of any law enforcement officer, law enforcement agency or law enforcement association. Any violation of this chapter constitutes a violation of the Maine Unfair Trade Practices Act.

STATEMENT OF THE CASE

Respondent adopts the statement of the facts and procedural history contained in the decision of the Court of Appeals for the First Circuit below. App. 2a-11a.

REASONS FOR DENYING THE WRIT

In 1977, the Maine Legislature enacted the Solicitation by Law Enforcement Officers Act. 25 Me. Rev. Stat. Ann. §3701 *et seq.* The Act prohibited solicitations by or on behalf of police officers, police associations or police agencies if those solicitations benefited law enforcement. 25 Me. Rev. Stat. Ann. §3702.

In 1985 the Maine Supreme Judicial Court upheld the constitutionality of the Act against its first challenge. *State of Maine v. Maine State Troopers Ass'n. ("MSTA")*, 491

A.2d 538 (1985). The Supreme Judicial Court concluded that the Act was premised upon a finding by the Maine Legislature that "solicitation by a law enforcement agency is inherently coercive." *Id.*, 542-43. Additionally, the Supreme Judicial Court concluded that

> The State's interest in protecting the reputation of its law enforcement bodies is undeniably substantial. Indeed we would be hard pressed to suggest a weightier interest.

Id.

The defendant Maine State Troopers Association then filed an appeal to this Court. In 1985, this Court dismissed the *MSTA*'s appeal for want of a substantial federal question. 474 U.S. 802 (1985).

Between 1985 and 1990 the Maine Legislature enacted a number of amendments to the Act. The same plaintiffs as in the instant suit challenged the constitutionality of the amended Act in the United States District Court for the District of Maine. In February 1991, the District Court held the Act, as amended, unconstitutional. *Auburn Police Union v. Tierney*, 756 F.Supp. 610 (D. Me. 1991). In particular, the District Court found that the amendments enacted since *MSTA* had undercut the State's compelling interest in prohibiting police solicitations. *Id.*, 756 F.Supp. 610, 618.

In 1991, after the District Court's decision in *Auburn Police Union v. Tierney*, the Maine Legislature repealed the amendments found offensive by the District Court and re-enacted the prohibition on solicitations by law enforcement officers as it existed in 1985 with one change. Me. P. L. 1991 Chapter 510. Specifically, the Legislature

added the word "tangibly" prior to the word "benefits" in the statute to "clarif[y] that the ban on solicitation applies only when the solicitations provide a tangible benefit to law enforcement." Sen. Amend.B. to L.D. 1682 (115th Legis. 1991). This current version of the Act was upheld in this litigation against broad constitutional challenge by the District Court (App. 44a-62a) and the First Circuit Court of Appeals. App. 1a-43a.[1]

The State of Maine urges that this Court deny the Petition for Writ of Certiorari for three reasons. First, the Decision of the First Circuit does not conflict with any decisions of this Court, any Courts of Appeals or any of the highest state courts. Second, the decision below correctly applies precedent from this Court. Finally, the First Circuit's decision will not have broad national impact because Maine is the only state which has enacted a statute prohibiting solicitations by or on behalf of police officers.

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY COURT OF APPEALS

The decision below of the First Circuit Court of Appeals does not conflict with any decision of the United

---

[1] The District Court, while upholding the statute against claims of overbreadth, underinclusiveness and as applied invalidity, agreed with Petitioners' claims under the prior restraint doctrine and struck down the provision in the Act authorizing injunctive relief. App. 49a-52a. The First Circuit, however, found the Act to be constitutional in all respects and reversed the District Court's holding under the prior restraint doctrine. App. 38a-42a.

States Supreme Court, any of the Courts of Appeal or any highest states courts. Rather, as will be discussed in the next section, the First Circuit has correctly applied existing Supreme Court precedent in upholding the constitutionality of the Solicitation by Law Enforcement Officers Act. Moreover, Petitioners themselves do not refer to a single United States Supreme Court, Court of Appeals or highest state court decision that is in conflict with the decision below. Rather, Petitioners urge that the decision below "is discordant with the decisions of the District Courts in *Auburn Police Union v. Tierney,* 756 F.Supp. 610 (D. Me. 1991) and *Telco Communications v. Barry,* 731 F.Supp. 670 (D. N. J. 1990)." (Petition for Writ of Certiorari at p.8).

Petitioners' reliance on a purported conflict between the First Circuit's decision and the decisions of the Maine and New Jersey District Courts fails for two reasons. First, conflict between a decision of a Court of Appeals and a decision of a District Court is not the type of conflict considered so grave as to require resolution by the highest court in the country. This view is reflected in United States Supreme Court Rule 10-1(a) which provides that the Court, in exercising its discretion as to whether to grant a writ of certiorari, will consider whether a Court of Appeal's decision is "in conflict with the decision of another United States court of appeals on the same matter; or . . . with a state court of last resort. . . . " U.S. Sup.Ct.R. 10-1(a). Rule 10-1(a) does *not* provide that conflict between a decision of Court of Appeals and a decision of a District Court justifies the grant of discretion to issue a writ. *See* Stern, Gressman, Shapiro & Geller, *Supreme Court Practice* 178 (7th ed. 1993) ("The Supreme

Court will not grant certiorari to review a decision of a Federal Court of Appeals merely because it is in direct conflict on a point of federal law with a decision rendered by a District Court, whether in the same circuit or in another circuit.")

Second, neither of the two cited District Court cases are, in fact, in conflict with the decision of the First Circuit in this case. The Court of Appeals succinctly rejected the argument that the District Court's decision in [*Auburn Police Union v. Tierney*], was controlling:

> We find no merit in Plaintiffs' contention that [*Auburn Police Union v. Tierney,*], 756 F.Supp. 610, is stare decisis. This Court is not bound by a district court Opinion that was never appealed to, or affirmed in, this Court. *See* 1 B Moore's Federal Practice 0.402 [2], P.I-23 (1993). . . .

(App. 15a at n.10). Moreover, the statute before the Court of Appeals in this case had been amended to remove the exceptions which the District Court in *Auburn Police Union v. Tierney,* had found troublesome.

Petitioners' reliance on the District Court's decision in *Telco* is equally unavailing. In *Telco,* a New Jersey statute prohibited solicitations conducted by professional fundraisers but did not prohibit law enforcement officers from conducting those solicitations themselves. In analyzing the statute's purpose in preventing perceived or implicit coercion, the District Court concluded that there was no rational basis to distinguish (as the statute did) between solicitations by law enforcement officers themselves and solicitations by paid fundraisers. 731 F.Supp. 670, 679-80. The Maine statute, however, does not suffer from this infirmity because the Maine statute does

not distinguish between professional solicitors and law enforcement officers. Indeed, the District Court in *Telco* specifically reserved the question raised in the instant case as to whether a statute which prohibits *all* solicitations on behalf of law enforcement could withstand constitutional scrutiny. *Id.* 731 F.Supp. 670, 679 n.8.

The Court of Appeals' decision does not conflict with any decision of this Court, any other Court of Appeals or any highest state court. In fact, the decision below is absolutely consistent with the decision in the only other reported similar case: the Maine Supreme Judicial Court's 1985 decision in *MSTA*, as to which this Court dismissed the *MSTA*'s appeal for want of a substantial federal question.

II. THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS BELOW CORRECTLY APPLIED PRECEDENT FROM THIS COURT.

The First Circuit analyzed four major legal issues in upholding the constitutionality of the Solicitation by Law Enforcement Officers Act: overbreadth, underinclusiveness, unconstitutionality "as applied", and prior restraint. The court below relied upon and applied existing Supreme Court precedent in rejecting the first, second and fourth challenges to the constitutionality of the Act. With respect to the third challenge, the court correctly rejected Petitioners' argument on its facts.

A. Overbreadth

Relying upon and applying this Court's holding in *Hicks v. Miranda*, 422 U.S. 332, 343-45 (1975) and *Mandel v. Bradley*, 432 U.S 173 (1977), the First Circuit determined that the same overbreadth claim asserted here by Petitioners also was before the Court in *MSTA*. App. 15a-24a. This Court summarily dismissed the appeal in *MSTA* for want of a substantial federal question. 474 U.S. 802 (1985).

The Court of Appeals in the instant case, after a review of the papers before the Court in *MSTA*, concluded that, "[b]ecause §3702-A [the current version of the Act] is even narrower than the former §3702 [the provision existing at the time of *MSTA*], the Supreme Court's summary dismissal of *MSTA*, in which the Supreme Court necessarily rejected the overbreadth and compelling interest challenges . . . , is binding precedent on whether §3702-A is overbroad. . . . " (App. 23a-24a). The First Circuit properly relied upon the analysis required by *Hicks* and *Mandel* in holding that this Court's summary disposition of the appeal in *MSTA* had binding precedential effect on Petitioners' overbreadth claim in this case.

In analyzing the reach of the Supreme Court's summary affirmance in *MSTA*, the court below examined the overbreadth doctrine under both approaches to that doctrine taken by this Court: first, the doctrine of substantial overbreadth as enunciated in *New York v. Ferber*, 458 U.S. 747, 770 (1982) and, second, the approach requiring overbroad statutes to be supported by a compelling state interest and to be narrowly tailored to serve that interest.

Secretary of State of Maryland v. Joseph H. Munson Co., 467 U.S. 947, 965-66 n.13 (1984). App. 18a & 21a.

Even if this Court's dismissal of the appeal in *MSTA* were not binding precedent, Petitioners' overbreadth claims would fail under either approach to the overbreadth doctrine. With respect to the "substantial overbreadth" doctrine, the court below referred to two arguments advanced by Petitioners. First, Petitioners argued that the application of the Act to solicitations conducted through "unattended collection boxes" swept within the Act's prohibition conduct which was not inherently coercive. App. 19a. Second, Petitioners argued that the Act's coverage of solicitations by "private citizens unconnected with the police" was overbroad. *Id.*

The District Court specifically rejected these arguments in concluding that such solicitations did indeed create the risk of inherent coercion.

> As the [Maine Supreme Judicial Court] recognized from the beginning, appearance is as much a part of the problem as reality in avoiding police coercion. Even though no police personnel attend such a collection box, citizens and business people might well feel it necessary to be seen publicly depositing a contribution. Thus, prohibiting the unattended collection box would not be an unconstitutional application of the statute. This same reasoning – the pressure to acquire a public reputation of having financially supported the police – explains why the Legislature can also prohibit a civilian from raising money for police activities. . . .

App. 54a. The District Court also found that these hypothical applications of the Act, even if impermissible, would be insubstantial. App. 55a.

With respect to the overbreadth-compelling state interest doctrine, the legislative history analyzed by the Maine Supreme Judicial Court in *MSTA* makes clear that the Act serves the State's compelling interest in "protecting the reputation of its law enforcement bodies" by prohibiting "inherently coercive" solicitations by or on behalf of law enforcement. 491 A.2d 538, 542-43 (1985). Moreover, the Law Court stressed that the Act was indeed the least restrictive alternative.

> [B]ecause at least the appearance of coercion inheres in every solicitation on behalf of law enforcement agents, and because that appearance undermines the integrity of the office, the State has a compelling interest in regulating all law enforcement solicitations.

Id.

The First Circuit concluded that the overbreadth claim raised in *MSTA* is identical to the overbreadth claim raised by Petitioners in this case. Petitioners have not advanced any reason why this federal question is any more substantial now than it was in 1985 when this Court dismissed the *MSTA*'s appeal for want of substantiality.

B. Underinclusiveness.

The court below next addressed Petitioners' underinclusiveness argument under both the Equal Protection Clause and the First Amendment. App. 24a-34a. In rejecting, Petitioners' arguments of underinclusiveness, the

First Circuit relied upon this Court's guidance that to withstand a claim of underinclusiveness, "the State must be able to point to clear reasons for the distinctions drawn by the Act." App. 29a (citing and relying upon this Court's decisions in *Austin v. Michigan State Chamber of Commerce*, 494 U.S. 652, 666 (1990); and *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). The court below then found that the Maine Legislature had " 'clear reasons' for the asserted exemptions from the Act's prohibitions, and the reasons are not only clear but rational. . . . " *Id.* at 34a.[2] Consequently, utilizing the standards enunciated by this Court in *Austin* and *Mosley*, the First Circuit properly held "that the Maine Act is not unconstitutionally underinclusive." *Id.*

---

[2] The Court of Appeals addressed three arguments that the Act was underinclusive and with respect to each argument found that the state had a clear and rational reason for its distinctions. App. 32a-33a. First, the court found that, with respect to the exception for solicitations for charitable purposes unrelated to law enforcement, that "[t]he Legislature could reasonably conclude that [charitable solicitations] present sufficiently less likelihood of harm. . . . " App. 32a. Second, the court found that the Act's coverage of law enforcement officers and not other public employees was justified by the reasonable legislative conclusion "that police solicitation has a special potential for coercion not present in solicitation by other officials." App. 33a. Third, the court found that the statutory exception for law enforcement officers running for elective office (e.g., county sheriffs) was substantially justified by the First Amendment rights of those officers "to engage in campaign speech." App. 34a.

C. As Applied Challenge.

Petitioners argued to the First Circuit that the Solicitation by Law Enforcement Officers Act was unconstitutional as applied to Petitioners. The court below, relying not upon court precedent but upon an analysis of the facts, decided otherwise. Specifically, the Court of Appeals analyzed the solicitations which Petitioners sought to engage in and concluded that the "proposed solicitations remain inherently coercive, or at least do not remove the appearance of coercion and favoritism." App. 38a.[3] Consequently, the court below "reject[ed] [Petitioners'] argument that the Act is unconstitutional as applied." *Id.*

D. Prior Restraint.

The court below, in rejecting the District Court's conclusion that injunctions against police solicitation issued under the Act would violate the prior restraint doctrine,

---

[3] Specifically, Petitioners pointed to that part of their proposed solicitation that would attempt to keep confidential the names of those persons who did *not* purchase advertising in law enforcement magazines. The First Circuit rejected Petitioners' argument that their proposal eliminated the coercion inherent in law enforcement solicitations.

> The advertisements will be public. Accordingly, law enforcement officers will be aware of who contributed and, by the absence of advertisements, of who did not contribute. Moreover, those solicited may not believe, even if they are assured, that their names will not be communicated.

App. 37a.

adhered to existing Supreme Court precedent. Specifically, the court below relied upon *Pittsburg Press Co. v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376, 390 (1973) in concluding that

> An injunction that is narrowly tailored, based upon a continuing course of repetitive speech, and granted only after a final adjudication on the merits that the speech is unprotected does not constitute an unlawful prior restraint.

App. 40a. Consequently, the court found that the Act did not on its face constitute an impermissible prior restraint.

The Court of Appeals also noted that because the pending action involved a request for a declaratory judgment, no injunction restraining solicitation actually existed to be reviewed by the court. As a result, the court chose

> to let stand the Act's provision authorizing enforcement through injunctive relief and leave for another day the determination [under the *Pittsburgh Press* standard] whether a specific injunction – should the State decide to proceed in such a fashion – constitutes an unlawful prior restraint.

App. 41a-42a. The court below correctly rejected Petitioners' claim under the prior restraint doctrine.

III. THE FIRST CIRCUIT'S DECISION DOES NOT HAVE BROAD NATIONAL EFFECT: MAINE IS THE ONLY STATE WHICH HAS ADOPTED A STATUTE PROHIBITING SOLICITATIONS BY OR ON BEHALF OF POLICE OFFICERS.

In 1977, when the Maine Legislature enacted the Solicitation by Law Enforcement Officers Act, no other state had legislation broadly prohibiting solicitations by or on behalf of law enforcement officers. In the sixteen plus years since the enactment of the Maine statute, Maine's legislation has retained its unique status. Unlike the decisions of this Court in granting certiorari in cases where the challenged statute was identical or similar to statutes in many other states, the statute here stands alone. *See New York v. Ferber*, 458 U.S. 747, 749 n.2 (1982) (certiorari granted where 47 other states had similar statutes); and *New York v. O'Neill*, 359, U.S. 1, 3 (1959) (certiorari granted where 42 other states had similar statutes).

The First Circuit's decision upholding the constitutionality of the Solicitation by Law Enforcement Officers Act will affect the Maine statute and only the Maine statute. The decision below will not have any broad national impact and does not justify full review by this Court.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted

MICHAEL E. CARPENTER
Attorney General

STEPHEN L. WESSLER
Assistant Attorney General
Director, Public Protection Unit
(Counsel of Record)
State House Station 6
Augusta, Maine 04333
(207) 626-8800

Counsel for Respondent

THOMAS D. WARREN
Assistant Attorney General

Of Counsel

April 1994